No. 83-173

In The
# Supreme Court of the United States
October Term, 1983

MILTON R. WASMAN,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

1. Whether a sentence may properly be enhanced following re-trial and re-conviction after a first conviction is reversed on appeal when that enhancement is based upon conduct of a defendant which occurred prior to the first sentencing hearing?

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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## BRIEF FOR PETITIONER

## OPINION BELOW

The opinion of the Court of Appeals is officially reported at 700 F. 2d 663 (11th Cir. 1983) and appears in the Appendix to the Petition for Writ of Certiorari (A-1 to A-32).[1] The *per curiam* order denying Wasman's petition

[1]Reference to pages in the appendix to the Petition for Writ of Certiorari shall be A—. Reference to pages in the Joint Appendix shall be J.A. —. Reference to the appendix to this brief shall be App. —.

for re-hearing and/or sugestion for re-hearing *en banc* is set out at A-68 to A-69 of that same Appendix.

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## JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on March 17, 1983. A petition for re-hearing and/or suggestion for re-hearing *en banc* was denied on June 2, 1983. A timely petition for a writ of certiorari was filed on August 1, 1983. Certiorari was granted on October 31, 1983. An extension of time within which to file this brief was given until December 22, 1983.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

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## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of . . . liberty . . . without due process of law . . . .

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## STATEMENT OF THE CASE

This case calls into review the precepts set out by this Court in *North Carolina v. Pearce,* 395 U. S. 711 (1969) dealing with when a trial court may enhance a de-

fendant's sentence following re-trial and re-conviction after a first conviction has been reversed on appeal.

Petitioner was charged by indictment with wilfully and knowingly making false statements in an application for a passport with the intent to induce and secure the issuance of a passport in violation of 18 U. S. C. § 1542. (1R, p. 1).[2] The case was tried twice and the Petitioner was found guilty each time. There was never really any dispute as to the fact that the Petitioner obtained a passport in the name of another, a deceased law school classmate of his, but rather, through two trials and two appeals, the issue involved his intent and reasons.[3]

In September of 1979, the case was first called up for trial and the Petitioner was found guilty as charged. (2R, p. 327). On October 18, 1979, he was sentenced to two (2) years incarceration, but pursuant to the split sentencing provision of 18 U. S. C. § 3651, whereby he was to serve six months incarceration and then be placed on three (3) years probation. From that conviction, Wasman appealed.

While his appeal was pending in the Fifth Circuit, the Petitioner entered a plea of *nolo contendere* to a misdemeanor charge of possession of false certificates of deposit [18 U. S. C. § 480]. (See Appendix to this Brief

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[2]Record references shall be as follows: (—R, p. —) refers to the Record on Appeal (Volume 1 being pleadings and orders, Volumes 2 through 4 being trial transcripts); (—SR, p. —) refers to the Supplemental Record on Appeal—(1SR, p. —), (2SR, p. —) and (3SR, p. —) denoting, respectively, the First, Second and Third volumes of same.

[3]See proffer set out in the first *Wasman* case, *United States v. Wasman*, 641 F. 2d 326, 328 (5th Cir. 1981) and the background section of the second opinion. *United States v. Wasman*, 700 F. 2d 663, 665 (11th Cir. 1983).

for transcript of change of plea, App. 1-App. 15.) That plea, also entered consistent with the rationale of *North Carolina v. Alford*, 400 U. S. 25 (1970),[4] was a negotiated one, whereby the Government dismissed a mail fraud indictment in return for the *nolo* plea. That mail fraud indictment had been pending at the time of the Petitioner's sentencing in the passport case, the underlying facts having occurred a number of years earlier.

Following a lengthy sentencing hearing in the false certificates case in which it was noted that the charge to which the Petitioner had pled *nolo contendere* was interwoven with the facts of the "passport" case (App. 36, 39), the District Judge, taking into account the then pending passport conviction and sentence, imposed a sentence of two (2) years probation. (App. 39).

Shortly after the sentencing hearing in the certificates misdemeanor case, the Fifth Circuit reversed the first passport case and remanded for a new trial. *United States v. Wasman*, 641 F. 2d 326 (5th Cir. 1981). At that second trial, the Petitioner was again found guilty. (4R, p. 370).

On August 31, 1981, the Petitioner appeared for sentencing. At that hearing, the trial court imposed a sentence of a straight two (2) years incarceration. (See pp. A-33 to A-67 of Petition for Writ of Certiorari for a transcript of the second sentencing hearing; J.A. 4-5 contains the Judgment and Probation/Commitment Order.) At the sentencing hearing, counsel for Wasman urged the trial court not to consider the intervening *nolo contendere*

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[4]A plea of convenience.

plea to the misdemeanor charge pursuant to the case of *North Carolina v. Pearce*, 395 U.S. 711 (1969) in that the facts of the intervening conviction occurred prior to the first sentencing hearing and the related mail fraud indictment was pending at that time. (A-42 through A-65). The trial judge rejected that argument and enhanced the sentence because of the intervening conviction. (*Id.*) On appeal, the Eleventh Circuit affirmed and in so doing noted that it was taking a different approach to the *Pearce* guidelines than did the Second and Ninth Circuits in *United States v. Markus*, 603 F.2d 409 (2d Cir. 1979) and *United States v. Williams*, 651 F.2d 644 (9th Cir. 1981), respectively. *United States v. Wasman*, 700 F.2d 663, 669 (11th Cir. 1983).

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## SUMMARY OF ARGUMENT

This Court in *North Carolina v. Pearce*, 395 U.S. 711 (1969) stated that due process requires that vindictiveness against a defendant for successfully bringing an appeal must play no part in the re-sentencing process should the defendant be re-convicted. Further, to insure that a defendant is able to make a free and unfettered decision as to whether even to take an appeal, this Court in *Pearce* fashioned a prophylactic rule to take fear of possible vindictiveness out of the defendant's mind when making that decision. That rule required that whenever a judge chooses to enhance a sentence on re-conviction, reasons must be stated in the record based upon objective conduct of the defendant occurring after the time of the first sentencing hearing.

The case presented here asks this Court merely to order the Eleventh Circuit to obey the test set out in *Pearce*. The Court of Appeals, in approving the enhancement, has broken from its sister circuits, specifically the Second and Ninth, and permitted the trial court on resentencing to enhance based solely on an intervening plea of *nolo contendere* to a charge involving facts occurring prior to the first sentencing hearing.

The Petitioner did nothing between the two sentencing hearings except to resolve a pre-existing factual situation in court. He committed no new bad act that should give rise to an enhanced sentence. The enhancement served none of the recognized goals and objectives of sentencing and resulted in an improper pyramiding of sentences.

To allow the actions of the trial judge and Court of Appeals to stand undermines the due process considerations addressed in *Pearce* and instills fear in all those convicted defendants who may have other charges pending. Instead of making a free and unfettered decision as to whether to take an appeal, defendants would be placed in the dilemma of perhaps deciding not to appeal for fear that if re-tried, an enhanced sentence could result if during the interim, they were convicted of pending charges.

## ARGUMENT

**Enhancement Of Sentence Following Re-Trial And Re-Conviction After A First Conviction Is Reversed On Appeal Cannot Be Based Upon Conduct Of The Defendant Occurring Prior To The First Sentencing Hearing Even If That Conduct Results In An Intervening Conviction.**

**A. The Pearce test was designed to remove not only actual vindictiveness but also fear of vindictiveness from the re-trial and re-sentencing process.**

In 1969, this Court had the opportunity to address the issue of whether the imposition of a harsher sentence following re-trial and re-conviction when a first trial had been reversed on appeal violates the double jeopardy provisions of the Fifth Amendment. In *North Carolina v. Pearce*, 395 U. S. 711 (1969), a majority of this Court held that there was no absolute constitutional bar to the imposition of a harsher sentence upon re-trial. But it was noted that due process requires that vindictiveness against the defendant for exercising his appellate rights must play no part in that enhancement of sentence and that the defendant should be free of fear of vindictiveness that may otherwise deter him from taking an appeal. 395 U. S. at 723-725. To insure such a result, this Court fashioned a prophylactic rule:

> [W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the de-

fendant occurring after the time of the original sentencing proceeding. 395 U. S. at 726.

In setting out such a rule, this Court was concerned not only that actual vindictiveness play no part in any re-sentencing process but also that a defendant should be able to decide whether to exercise his appellate rights free and unfettered from the apprehension that a trial judge would act with a retaliatory motive at any subsequent sentencing. *North Carolina v. Pearce*, 395 U. S. at 724-725. That such a fear of enhanced penalty on re-trial exists could not be demonstrated more poignantly than was expressed in the letter of a prisoner quoted by the trial judge in *Patton v. North Carolina*, 256 F. Supp. 225 (W. D. N. C. 1966), and cited in *North Carolina v. Pearce*, 395 U. S. at 725, n. 20:

"Dear Sir:

"I am in the Mecklenburg County jail. Mr. —— chose to re-try me as I knew he would.

• • • • • • • • • • •

"Sir the other defendant in this case was set free after serving 15 months of his sentence, I have served 34 months and now I am to be tried again and with all probability I will receive a heavier sentence then before as you know sir my sentence at the first trile was 20 to 30 years. I know it is usuelly the courts prosedure to give a larger sentence when a new trile is granted I guess this is to discourage Petitioners.

"Your Honor, I don't want a new trile I am afraid of more time • • •

"Your Honor, I know you have tried to help me and God knows I apreceate this but please sir don't let the state retry me if there is any way you can prevent it"

Very truly yours"

256 F. Supp. at 231, n. 7.

In order to take this fear of enhanced punishment out of the decision making process of a defendant and to remove not only actual vindictiveness from re-sentencing but also the appearance of vindictiveness, the above quoted test was set out in *Pearce* by which the trial court when enhancing a sentence must point to identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

In the instant case, the trial court looked to the intervening misdemeanor plea of *nolo contendere* as the basis of enhancing the Petitioner's sentence by eighteen (18) months.[5] The question at issue is whether the conduct that may serve as the basis of enhancement is actual physical acts of a defendant (in this case the actual illegal possession of false certificates of deposit) or merely the resolution of that conduct in a court proceeding.

The mail fraud indictment, the forerunner to the false certificates charge, was pending and known to the trial judge in the instant (passport) case at the time of the first sentencing. The only relevant occurrence between the two passport case sentencings was that the mail fraud case was resolved when the Government dismissed the pending indictment and Wasman pled *nolo contendere* to the misdemeanor information filed in its place, a plea

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[5]The original sentence imposed was two years but pursuant to the split sentencing provisions of 18 U. S. C. § 3651, whereby the Petitioner was to serve six (6) months incarceration followed by three years probation. The second sentence involved a straight two year period of incarceration. It is beyond dispute and has been conceded below that the second sentence was an enhanced one over that previously imposed. *See United States v. Williams*, 651 F. 2d 644, 647 (9th Cir. 1981); *United States v. Gilliss*, 645 F. 2d 1269, 1283 (8th Cir. 1981); *United States v. Markus*, 603 F. 2d 409 (2d Cir. 1979).

given (and accepted) with the announcement that it was made consistent with *North Carolina v. Alford*, 400 U.S. 25 (1975), that is, a plea entered as being in the overall best interest of the defendant.

The trial court, while setting forth its reasons as required by *Pearce* for the enhancement, misses the mark as to what this Court was trying to accomplish in that opinion.

Clearly, a trial court cannot punish a defendant for successfully bringing an appeal by automatically enhancing his sentence on re-conviction. *North Carolina v. Pearce*, 395 U.S. at 723. Just as clearly fear of vindictiveness must be removed from the process. *Id.* at 724-725. In fact, this Court in explaining *Pearce* noted that its decision there was not grounded upon the proposition that actual retaliatory motivation must always exist but rather that fear of vindictiveness may unconstitutionally deter a defendant's exercise of his right to appeal. *Blackledge v. Perry*, 417 U.S. 21, 28 (1974). Also, in *United States v. Goodwin*, 457 U.S. 368, 102 S.Ct. 2485 (1982), this Court noted:

> Both *Pearce* and *Blackledge* involved the defendant's exercise of a procedural right that caused a complete retrial after he had been once tried and convicted. The decisions in these cases reflect a recognition by the Court of the institutional bias inherent in the judicial system against the retrial of issues that have already been decided. The doctrines of *stare decisis*, *res judicata*, the law of the case, and double jeopardy all are based, at least in part, on that deep-seated bias. While none of those doctrines barred the retrials in *Pearce* and *Blackledge*, the same institutional pressure that supports them might also subconsciously motivate a vindictive prosecutorial or judicial re-

sponse to a defendant's exercise of his right to obtain a retrial of a decided question.

102 S. Ct. at 2490-2491.

The concern about these possible subconscious reactions to retrials is an important reason for the need for the objective standard of *Pearce*, that is, to take subconscious motivation out of the picture. Whether a judge acts out of actual vindictiveness or with a motive subconsciously derived from the reversal of the first trial is difficult if not impossible to determine. Because of that difficulty, the objective prophylactic test set out in *Pearce* is needed. *See* Note, *Limitations on Sentencing After Reconviction by Jury*, 87 HARV. L. REV. 233, 237-238 (1973).

In affirming the enhancement of sentence that occurred here, the Eleventh Circuit stressed that due process is not offended when there is no showing of vindictiveness or a realistic likelihood of vindictiveness. *United States v. Wasman*, 700 F. 2d 663, 669 (11th Cir. 1983).[6] The Circuit Court, however, overlooked the other very real purposes of *Pearce*, that is, to avoid the appearance of vindictiveness and to remove the apprehension of fear from the mind of the defendant at a time when he must decide whether to take an appeal. In so doing, the lower court has broken from the other Circuit Courts of Appeals that have considered similar issues in the wake of *Pearce*.

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[6]It is hard to conceive that there would ever be a case where a clear cut indication of vindictiveness would appear in a record. A review of the transcript of the sentencing in this case (A-33 through A-67) reveals strong negative feelings against the Petitioner. The trial judge appears to be displeased with the sentence given by the judge in the misdemeanor case and was acting essentially as a reviewing body.

*United States v. Williams*, 651 F.2d 644 (9th Cir. 1981); *United States v. Markus*, 603 F.2d 409 (2d Cir. 1979).[7] The Eleventh Circuit looked for support to several post-*Pearce* cases of this Court. However, a review of those cases reveals that they do not support the enhancement that occurred here.

In *Colten v. Kentucky*, 407 U.S. 104 (1972), this Court was presented with a case involving a two-tier system whereby a person charged with a misdemeanor may first be tried in an inferior court and, if dissatisfied with the outcome, may have a trial *de novo* in a court of general jurisdiction but must risk a greater punishment if convicted. This Court, in approving the Kentucky system, distinguished *Pearce* noting that a trial *de novo* represents a completely fresh determination of guilt or innocence by a different court than imposed the first sentence. 407 U.S. at 116-117. Further, it was noted that the concerns of *Pearce*—to take vindictiveness and fear of vindictiveness out of the appeal and re-sentencing process—are not present in the two-tier trial *de novo* system. *Id.* at 116. Of course, in the instant case, the Court is not presented with a two-tier system and a request for a *de novo* trial before a different judge. This case involves a straight retrial before the same judge after the first trial and conviction was reversed.

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[7]The *Wasman*, *Markus* and *Williams* cases are compared and discussed in light of *Pearce* in an article now in the final pre-publication stage for the Washington & Lee Law Review. That article, Note, *Intervening Convictions as Support for Enhanced Sentences Following Appeal and Retrial*, 41 Wash. & Lee L. Rev. — (1984) is scheduled for publication in February of 1984. Final proofs will be forwarded to the Clerk of this Court as soon as available.

*Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), unlike the case *sub judice*, involved a jury-imposed sentencing scheme. This Court held that the Due Process Clause is not offended by the imposition of a harsher second sentence by a jury as long as the jury is not informed of the prior sentence and no other indicia of vindictiveness is shown. 412 U.S. at 35.

Finally, in *Moon v. Maryland*, 398 U.S. 319 (1970), this Court dismissed a writ of certiorari originally issued to consider the retroactivity of the then recent *Pearce* case, when it was stated that no claim of actual vindictiveness on the part of the trial judge was made. But the removal of fear of vindictiveness in the mind of the defendant has always been as much a goal as removal of vindictiveness itself. *United States v. Goodwin*, 457 U.S. 368 (1982); *Blackledge v. Perry*, 417 U.S. 21, 28 (1974).

**B. No objective of sentencing is served by allowing enhancement based upon conduct occurring prior to the first sentencing hearing even if that conduct results in an intervening conviction.**

With regard to whether enhancement of sentence based upon the precise facts of this case meet the requirements of due process as announced in *Pearce*, it is helpful to review the generally recognized goals and objectives of the sentencing process-deterrence, rehabilitation and punishment.[8]

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[8]See Nagel and Hagen, *The Sentencing of White-Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity*, 80 Mich. L. Rev. 1427 (1982).

The first goal is to deter the defendant (and others) from committing new wrongs in the future. As a corollary it may be said that the obvious object of any rule of law, whether legislatively or judicially created, is to make the citizenry more law-abiding. There is no deterrent effect to allowing actions and behavior of Wasman occurring prior to the first sentencing hearing to be used as a basis for enhancement at the second hearing. He did nothing following the first sentencing hearing other than to resolve in court a pre-existing factual situation. If enhancement is to take place, it should be due to actions of the defendant. Under the reading of *Pearce* advocated here and adopted by the Second and Ninth Circuits,[9] the "ball is placed in the defendant's lap." If enhancement is to take place, it should be due to actions of the defendant. If he does something new following the first sentencing, he should "pay the price." Otherwise, if there is no identifiable bad conduct of the defendant occurring after the time of the first sentencing, then there is no basis for enhancement.

A second goal of sentencing is rehabilitation. Obviously, if the defendant has committed no new bad act after the first sentence was imposed, the rehabilitation function can be said to have been satisfied.

In enhancing the sentence here, the predominant if not the only goal of the trial court is that of punishment, that is, the intervening plea has given him cause to see

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[9]*United States v. Markus, supra,* and *United States v. Williams, supra,* respectively.

the Petitioner as deserving of more punishment. The Eleventh Circuit was also troubled by the fact that the approach to *Pearce* advocated by the Petitioner, and followed by the Second and Ninth Circuits in *Markus* and *Williams*, respectively, would give the Petitioner the unfair advantage of "having his cake and eating it, too." *United States v. Wasman*, 700 F. 2d at 670. The court noted that where, as here, Wasman specifically requested at the first sentencing hearing that the judge not consider the pending indictment, (J.A. 26), then, at the second sentencing hearing, he should not be able to argue that the resulting conviction not be considered because the facts pre-dated the first hearing. *Id.* The Eleventh Circuit was concerned, as was the trial judge, that the defendant would escape being sentenced with both cases present for consideration by the sentencing judge. However, that fear is unwarranted. Wasman was sentenced with his guilt in both the passport and certificates case considered. Those were precisely the circumstances presented when he was sentenced in the certificates case. At the time of that sentencing, the first passport conviction was pending on appeal. The trial judge in the certificates case specifically acknowledged that conviction and noted that both cases arose from basically the same facts. (App. 39). The judge then went on to sentence Wasman to two years probation. Thus, a United States District Judge imposed a sentence fully aware of both convictions and fully able to consider both in arriving at an appropriate sentence. Perhaps the judge in the instant case did not like the sentence imposed in the certificates case. But to permit the enhancement as occurred here requires a defendant

to run the gauntlet too many times and results in an improper pyramiding of sentences.[10]

In its opinion, the Eleventh Circuit notes that to adopt the *Williams-Markus* approach to *Pearce* would have "two possible consequences, neither likely to be of service to the governing constitutional considerations in *Pearce*." *United States v. Wasman*, 700 F. 2d at 669. According to the Eleventh Circuit, the first consequence would be for a sentencing judge to consider a charge merely pending at the time of the first sentence. Further, if the judge did not consider a pending charge, then the defendant would receive, according to the Court of Appeals, "total immunization of the predating offense from consideration at any time." 700 F. 2d at 669.

However, the Circuit Court overlooks the fact that the predating pending charge will be resolved at some time, as was the certificates case here. If the defendant is subsequently convicted of that charge, as he was here, he will come before a judge for sentencing. When he does, the judge will be able to consider both the case before him and the prior conviction in arriving at an appropriate sentence (as the judge in the false certificates case did here when he considered the first passport conviction. (App. 39)). If the defendant is found not guilty of the predating offense, then clearly that offense should not be considered by another judge in another case as an aggravating circumstance for sentencing. Thus, the defend-

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[10]It is ironic that the sentence was enhanced by eighteen (18) months (six months to two years) based upon a conviction of a misdemeanor for which the maximum allowable sentence was only one year (18 U. S. C. § 480) and for which the Petitioner received a probationary sentence. (App. 39).

ant will not be immunized if a judge does not consider pending charges, even if he will be precluded from considering an ensuing conviction should his case be reversed on appeal and a second sentencing be required.

This Court has said that a trial judge is not constitutionally precluded, in re-sentencing, from considering events subsequent to the first trial that may throw new light upon a defendant. *North Carolina v. Pearce*, 395 U. S. at 723. Though the intervening conviction may shed new light on a defendant, the chilling effect upon the defendant's decision-making as to whether to exercise his appellate rights demands that prior conduct not be considered on re-sentencing. To hold otherwise would result in an improper pyramiding of sentences as well as instill fear of vindictiveness in the defendant.

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## CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that the judgment of the Court of Appeals should be reversed and the case remanded to the district court for re-sentencing before a different district judge.

Respectfully submitted,

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December 1983

## APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 78-259-Cr-EBD

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

MILTON R. WASMAN,

*Defendant.*

United States Courthouse
300 Northeast 1st Avenue
Miami, Florida
October 30, 1980

The above-entitled matter came on for hearing before the Honorable EDWARD B. DAVIS, United States District Judge, at the time and place aforesaid, pursuant to Notice.

APPEARANCES:

KEVIN M. MOORE,
Assistant United States Attorney
on behalf of the Government.

SANDS & MOSKOWITZ, by
JAY R. MOSKOWITZ, ESQ.
on behalf of the Defendant.

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(p. 2) INDEX

(p. 3) The Clerk: The case of United States of America vs. Milton Wasman.

Counsel, come forward, please.

Mr. Moore: Good afternoon, your Honor. Michael Moore on behalf of the Government.

Mr. Moskowitz: Jay Moskowitz, on behalf of Milton Wasman, who is here.

The Court: Mr. Wasman, the Court is informed that you wish to enter a plea of guilty to the Information filed against you in this case. Is that correct?

Mr. Moskowitz: May I speak, your Honor?

The Court: Yes.

Mr. Moskowitz: As your Honor is well aware, there has been a pending indictment against Mr. Wasman for a couple of years now. You had it for quite some time.

An Information was recently filed by the United States Government as part of negotiations that we had a condition of that Information there was a dismissal of the indictment.

What we would like to do today, your Honor, if your Honor is so inclined, is Mr. Wasman would like to enter a plea of nolo contendre to the (p. 4) Information. Knowing full well when we say that, the Government as a matter of policy must always oppose a nolo plea but the Court can accept it.

I would just like to make a couple of statements, if I may, in that regard.

First off, that this case has been around in one form or another for a long, long time. One reason was that the first year Mr. Wasman was ill. He had a stroke. And that was during the year 1979.

Since I got into the case, and I think since your Honor got into the case back in February of this year, we have had numerous delays due to the complex nature of the case, the numerous out-of-country witnesses, the proposed lengthy trial schedule and trying to accommodate all of those parameters and getting the case together just kept putting it off and putting it off and putting it off.

Within recent weeks, as I have stated before, the Government and Mr. Moore, representing the Government, and I have been involved in some discussions in an attempt to resolve this case, keeping in mind all of the parameters I just mentioned.

It culminated in the filing of that Information I mentioned last week.

Now, Mr. Wasman is sixty-three years (p. 5) old and, in addition to the advancing age and the problem that he has with his health, also has the residual effects of the stroke he suffered last year.

At this particular time, we would like to try the mail fraud case. Mr. Wasman feels he just would like to get this whole thing over with and put it behind him, which is the reason we resolved this in the way we did in the terms of the filing of this Information.

I think that this is a case that would speak for a nolo plea, if the Court would consider one.

The Court: Mr. Moore.

Mr. Moore: For the record, the Government would note its objection to the plea of nolo.

The Court: This charge has been reduced to a misdemeanor, has it not?

Mr. Moskowitz: Yes.

The Court: Then we will start this over a little bit.

Mr. Wasman, I understand that you wish to plead nolo contendre to the Information filed against you in this action. Is that correct?

The Defendant: That is correct, sir.

The Court: Before accepting your nolo contendre plea, there are a number of questions I will (p. 6) ask you to assure that it is a valid plea.

If you do not understand any of the question or at any time wish to consult with your attorney, please say so since it is essential to a valid plea that you understand each question before you answer.

Bruce, would you swear the defendant?

Thereupon—

MILTON R. WASMAN

was called as a witness and, having been first duly sworn, was examined and testified as follows:

*Direct Examination*

By the Court:

Q. Do you understand that having been sworn, your answers to my questions will be subject to the penalties of perjury for making a false statement if you do not answer truthfully?

A. Yes, sir.

Q. How old are you, Mr. Wasman?

A. Sixty-three.

Q. And you have gone through law school, is that not correct?

A. Yes, sir.

Q. Have you taken any drugs, medicine or pills or had any alcoholic beverage in the last twenty-four hours?

(p. 7) A. I take six or eight little red pills that are called Pernanthan··m [phonetic], something like that. It enables the blood to go easier through the vascular system.

Q. Blood pressure medication or cardiovascular?

A. Yes. It's because of the strokes I have had and trying to prevent it. I think what they are doing is greasing my blood a little bit to put it in layman's language. It has no side effects.

I also take a little blue pill. I take two and a half, whatever it is, millimeters of it for control of diabetes. That has no side effects.

And I take three Ascriptins twice a day. That's for the fascular problem and arthritis.

That's all the medication I take.

And I have not had any alcoholic beverages in weeks or any other drug.

Q. You certainly understand what is happening here today?

A. Yes, sir.

The Court: Mr. Moore, do you have any doubt as to the defendant's competence to plead?

Mr. Moore: No, your Honor, none at all.

(p. 8) The Court: I am sure, Counsel, you don't have any doubt.

Mr. Moskowitz: No, your Honor.

By the Court:

Q. Mr. Wasman, have you had an ample opportunity to discuss this case with your attorney?

A. Yes. On more than one occasion.

Q. Are you satisfied with his representation?

A. Absolutely.

Q. Have you received a copy of the Information charging you?

A. No, sir. But I have been over it thoroughly with Mr. Moskowitz and I don't need to have one in my possession.

Q. You are thoroughly familiar with the charge?

A. Yes. If I got it, I would just go down and discuss it with him anyhow.

I do not feel that's important.

Q. You have discussed the charges in that Information which you intend to plead nolo?

A. Yes, totally.

Q. Do you understand that the maximum (p. 9) possible penalty under Count 1 in the Information is one year imprisonment plus a fine of $1,000?

A. Yes, sir.

Q. You understand also that under the Constitution and laws of the United States you are entitled to a trial by jury on the charges contained in the Information?

A. Yes, sir, I do.

Q. And you understand that at that trial you would be presumed to be innocent and the Government would be required to prove you guilty by competent evidence and beyond a reasonable doubt before you could be found guilty; you would not have to prove that you were innocent?

A. Yes, sir, I do.

Q. Do you understand also that at trial while you would have the right to testify if you chose to do so, you would also have the right not to testify and no inference or suggestion of guilt could be drawn from the fact that you did not testify?

A. Yes, sir.

Q. If you plead guilty and I accept your plea, do you understand that you will waive your right to a trial and the other rights I have just discussed; (p. 10) there will be no trial and I will enter a judgment of guilty and sentence you on the basis of your nolo plea after considering a pre-sentence report?

A. Yes, sir, I do.

Q. Do you also understand that you will have to waive your right — that you may have to waive your right not to incriminate yourself since I may ask you questions what you did in order to satisfy myself that you are

guilty as charged and that you will have to acknowledge that guilt in the questions that I ask?

A. Yes, sir.

Q. Having discussed your rights with you, do you still wish to plead nolo contendre?

A. Yes, sir, I do.

The Court: Mr. Moore, what in summary would the Government's evidence be in this case?

Mr. Moore: Your Honor, the evidence at trial would show, your Honor, that in the early 1970's the defendant, Milton Wasman, sought investment capital for the purpose of developing a parcel of real estate in Central Florida.

The defendent's principal source of investment funds was raised through a prospectus promoted primarily to foreign investors which prospectus, (p. 11) your Honor, we have available for the Court's inspection as Government's Exhibit 1-A, which is in a foreign language, and Government's Exhibit 1-B, which is translated in the English language.

The principal feature of the prospectus offered an approximate fifteen percent return on the investment which would be secured by real estate and certificates of deposit.

The subsequent investigation disclosed that the certificates of deposit were not genuine but were, in fact, counterfeit as having been issued on a non-existent foreign bank.

Your Honor, we have a copy of the certificate of deposit for the Court's inspection as Government's Exhibit No. 2.

The testimony of the witnesses as disclosed, among other things, that the defendant instructed his secretary to forward the counterfeit foreign certificates of deposit to Lawyers Title Guaranty Company after instructing his secretary to sign the name John McCallum, a non-existent person, to a cover letter which enclosed the counterfeit foreign securities, and that is contained in Government's Exhibit No. 2.

It was later determined that the certi (p. 12) ficates of deposit to secure the prospectus were in fact issued on a non-existent foreign bank, and we have established that in Government's Exhibit 3-A, which is from the Republic of Panama certifying the non-existence of the foreign bank, and in 3-B, which is the translation of Government's Exhibit 3-A.

The principal acts of the defendant took place during a period and date of October 31, 1973, and took place principally in the Southern District of Florida.

Substantially, your Honor, that would be the government's evidence.

The Court: Mr. Moskowitz, do you disagree with anything you have heard?

Mr. Moskowitz: Not really in terms of what Mr. Moore has said.

I would just like to make one observation, as I started to mention before, your Honor, at the beginning when I told you what we were here for.

As I said, this case has been around a long time and that is why we are here with this negotiated plea.

Offering a plea of nolo and in conjunction with what Mr. Moore just said, I mentioned the (p. 13) case of North Carolina vs. Alferd which just talks basically about a plea not admitting the offense but saying, "It's in my best interest to enter the plea," and the combination of the two, the nolo plea and North Carolina vs. Alferd, I have no further comments.

By the Court:

Q. Mr. Wasman, has anyone threatened you or anyone else or forced you in any way to plead nolo contendre?

A. No, sir.

Q. Do we have a written plea agreement entered into between you, your counsel and counsel for the Government?

Mr. Moskowitz: We have not formally entered into a written agreement, your Honor. We have exchanged some letters which sets forth to some degree.

The agreement we have basically is that in return for Mr. Wasman's plea for the Information which was just filed the mail fraud indictment will be dismissed and, secondly, at the time of sentencing, the Government will make no recommendation as to sentence.

There are a couple of collateral matters (p. 14) which does not really go to the heart of the plea agreement.

One, Mr. Wasman has another case that is now pending before the Fifth Circuit which may very well be re-

manded for a new trial, and we have a collateral matter about the use of anything that occurs here at that subsequent trial.

But that is not really conditioned upon this plea.

The Court: Mr. Moore, do you agree with that statement?

Mr. Moore: Yes, your Honor, I think that is substantially accurate.

By the Court:

Q. Mr. Wasman, has anybody made any promise to you other than that which has just been represented by counsel that induced you to plead nolo?

A. No, sir.

Q. Do you understand that the Court is not required to accept your nolo plea or the agreement that you have entered into and I may reject is; do you understand that?

A. Yes, sir, I am aware of that.

Q. If I do reject it, you will be advised (p. 15) in open court and you will have an opportunity to withdraw your nolo contendre plea.

However, if you continue to persist in your plea after the agreement is rejected, your sentence or your disposition of your sentence may be less favorable to you than has been proposed here.

Do you understand that?

A. Yes, sir.

Q. Has anyone made any prediction or promise to you as to what your sentence will be?

A. No, sir.

Q. Mr. Wasman, Count 1 of the Information charges that on or about October 31, 1973, at Dade County, in the Southern District of Florida, you knowingly and intentionally possessed and caused to be delivered false certificates of deposit purported to be issued by a bank in Panama, a foreign country, in violation of Title 18, United States Code, Section 480.

How do you plead to Count 1 of the Information?

A. Well, sir, I received those from the so-called brokers and I deivered them in accordance with the instructions given me.

Would you repeat the question, sir?

(p. 16) Q. How do you plead to the charge in Count 1 of the Information I just read to you?

A. Not knowing the procedures correctly, I apologize for going off into the wrong direction.

I plead nolo contendre.

The Court: The Court finds that you, Milton Wasman, are now alert and intelligent, that you understand the nature of the charge against you, appreciate the consequences of pleading nolo contendre, fully understand your rights and possible penalty.

The Court also finds that the evidence which the Government is prepared to present contains all the elements of the crime.

Furthermore, the Court finds that your decision to plead nolo contendre is freely, voluntarily and intelli-

gently made, that it is not the result of force or threats or promises apart from the plea agreement that has been discussed in open court and that you have had the advice of counsel of a competent lawyer with whom you say you are satisfied.

Your plea of nolo contendre is accepted by the Court and the Court finds that the defendant, Milton Wasman, guilty of the offenses charged in the Information. The defendant is hereby adjudged guilty.

(p. 17) The Probation Office is directed to conduct a pre-sentence investigation of the defendant and submit the same to the Court.

By the Court:

Q. I presume you are out on bond at this time; is that correct?

A. Yes.

Mr. Moskowitz: I think it is a personal surety bond.

The Court: There is no objection to continuing that bond at this time—

Mr. Moore: No, your Honor.

The Court: — under the current terms and conditions?

I am going to continue that bond and I am going to turn you over to the Probation Officer to prepare the beginning of the PSI.

Court is adjourned.

Mr. Moskowitz: One further thing, your Honor.

One of the conditions of the plea was the dismissal of the mail fraud indictment.

I spoke to Mr. Moore before we began here, and he would have the proper papers tomorrow.

(p. 18) Mr. Moore: Your Honor, it is our intention to dismiss the outstanding indictment and we will do that forthwith.

The Court: Fine, Mr. Moore.

[Thereupon the hearing was concluded at 3:35 p.m.]

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(p. 19) CERTIFICATE

*State of Florida, County of Dade, ss.*

I, LARRY HERR, Official Court Reporter, do hereby certify that the foregoing transcript, pages 1 through 18, is a true and correct transcription of my stenographic notes of the proceedings before the Honorable EDWARD B. DAVIS, United States District Judge, at the time and place hereinabove set forth.

DATED at Miami, Dade County, Florida, this 28th day of April 1981.

/s/ Larry Herr

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(p. 1) IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 78-259-Cr-EBD

UNITED STATES OF AMERICA,

*Plaintiff,*

vs.

MILTON R. WASMAN,

*Defendant.*

United States Courthouse
300 Northeast 1st Avenue
Miami, Florida
January 21, 1981

The above-entitled matter came on for hearing before the Honorable EDWARD B. DAVIS, United States District Judge, at the time and place aforesaid, pursuant to Notice.

APPEARANCES:

KEVEN M. MOORE,
Assistant United States Attorney,
on behalf of the Government.

SANDS & MOSKOWITZ, by
JAY R. MOSKOWITZ, ESQ.,
on behalf of the Defendant.

(p. 2) The Clerk: The case of the United States of America vs. Milton Wasman.

Counsel come forward and state their appearance, please.

Mr. Moskowitz: Jay Moskowitz on behalf of the Defendant Mr. Wasman.

Mr. Moore: Michael Moore on behalf of the Government, your Honor.

The Court: Mr. Moskowitz, do you know of any reason why sentence should not be imposed at this time?

Mr. Moskowitz: None, your Honor.

The Court: Mr. Wasman, do you know of any reason?

The Defendant: No.

The Court: Do you have anything you want to say on behalf of your client?

Mr. Moskowitz: Yes, I have something to say. Mr. Wasman would like to address the Court personally. Mrs. Wasman is also in the courtroom and she would like to make a couple of statements to your Honor.

First off in just a bit of recap. If your Honor recalls back in October we entered this plea of nolo contendere to a one count misdemeanor of possessing false certificates of deposit in return for (p. 3) which the Government dismissed a four count mail fraud indictment.

At the time we announced we were doing so, Mr. Wasman was doing so not so much because of his guilt but because it was time to get these matters behind him

and that we would be submitting some information to the Court through the PSI explaining some of the situation in this matter.

We did submit a short summary with a lengthy supporting document as to much of the charges in the underlying mail fraud offense and also the offense now before the Court.

We would be happy to answer any questions the Court might have as to what is contained in those pages. They were quite lengthy, the total package, and I would not just want to waste the Court's time going over it in detail unless the Court has some specific questions about it.

Mr. Wasman would like to address the Court in some brief fashion about the situation. But unless the Court desires, we don't plan on reiterating in the PSI.

The Court: Yes, I looked that over and I went over the PSI carefully. I know in the prior case I think with Judge Rutger. In that case Judge (p. 4) Rutger sentenced Mr. Wasman I believe maybe under the split sentence provision. He sentenced him to six months confinement under the other case.

The Defendant: Yes, plus a period of probation. Which case is now presently on appeal.

The Court: I am aware of that.

Mr. Moskowitz: What I would like now if your Honor concurs is to have Mr. Wasman say a few words.

The Court: Surely.

The Defendant: Your Honor, I have been admonished by Mr. Moskowitz to make this brief and it is very

difficult to tell you the whole story about these things in short form.

However, let me start at a point which may be in addition to the PSI information. There is no sense in going over that.

I met the two people who were involved in the Traders Cove and LADCO transactions, Messrs. Phillips and Comminos some time in '70, '71 or '72. The dates escape me. They were in desperate need of some business. I didn't know this at the time and not until very recently they had been IOS and RAMCO under Mr. Vesco and that other group and had been wiped out of that when that went sour. And they got involved in (p. 5) some transaction in the selling of land, bona fide land in Freeport.

But that became worthless when Mr. Pindling took charge. Nobody was willing to buy nor could they do anything and it looked like all the investors were in deep trouble because they were either going to have to become natives or something difficult was going to happen.

So they were kind of frantic to get into something.

I knew a lady who was a broker there and who knew these two gentlemen because they were business associates.

So they came to me and they asked me if they could finance our Traders Cove Mobile Home Park. We became involved. They were constantly anxious to do more business. And my only desire was to complete Traders Cove Park.

If we borrowed the money on the plan, which was extremely expensive, it was only agreed to because they

also consented and promised to sell substantial other lots that we had for cash.

The other sales that we had made on the land adjacent to this area had been on installments over ten-year periods. So the cash transaction would (p. 6) have been substantial. The price was somewhere in the $3,000 range and we had two or 300 lots. So if we could sell those and get the cash we would be in a good cash position to go forward with other projects.

It was intended to just handle 150 or 200, 250 lots on the financing and complete it.

When I went in to stop that because we didn't need to do it any further they came up with all kinds of propositions.

Among them was the transaction involving buying of accounts receivable from a company on the Beach. I will point that out to you later.

And the other was to please help them do something and they would use the certificates which were furnished to me.

At first I was assured that everything was fine. Later when some problems came up I became aware of the fact there could be difficulties with them and later learned that there were difficulties with them.

What we did was to take the money, and this was my purpose, intent and job, and it arose because I had purchased a piece of land during the time we were working on the mobile home park and had sold it for a substantial profit in the company.

(p. 7) And they became very anxious to do that. And the market was extremely good. It was the appropriate time.

So they suggested and we arranged to take monies that they could arrange for in this fashion and put it into land, and we did. We bought 640 acres in Ocala, paid $460,000 for it and could easily have sold it for a million. But the broker told me it was worth a million eight and so I discussed it with these people and they said let's wait.

I bought a half interest with Robert Miller in another farm and we paid twenty-five hundred an acre. We sold forty acres for forty-five hundred an acre, the least desirable piece. And they wanted to wait a little longer, which was agreeable to me because there were no payments due on anything yet.

Then they wanted to go into other things. By that time we had 116 lots free and clear and the adjacent properties. We had developed a quarter of a million dollar recreation building for Traders Cove, we had a water plant and a sewer plant.

We had rather substantial property values. At that time I had already been working like fifteen, sixteen hours, eighteen hours a day running back and forth trying to practice law, going up to (p. 8) Ocala, going up to Sanford, Deland and the pressure of it had caused me to have a stroke. So that shortly after that while the effects were still quite serious I decided that I could not continue the pressure.

That's when things began to get kind of rough and nasty between us when I wanted to stop. They exerted

such pressure on me and my wife that eventually we sat down in October of '74 and Mildred had suggested to me there is nothing worth it. I had been to Europe and endeavored to turn the matter over to a trustee, a financial institution so that he could contact local people and have better rapport with the investors and carry on.

But they investigated the brokerage situation and felt that it had been so much overreaching that they just didn't want to become involved. And I couldn't get anybody over there to take it.

So when I told these people that I would not go any further we got together and I turned over to them all of these properties and I did that so that I would be able to be free of this constant pressure of working, go back to practicing law and live like a human being so that my wife would have a husband again.

It was her desire as much as mine. But it didn't work out that way. Everything I gave them, (p. 9) and I know this from the litigation that has ensued, they gave away the farm that was worth more than a million dollars and then it was foreclosed because the man they gave it to took all the timber off of it and sold all the hay off of it for two years and then didn't pay an installment on the underlying mortgage for the entire time, didn't pay the taxes for the entire time and of course it was gone together with the forty acres of it they had improperly sold to some people.

And on the other piece they did the same thing. They frittered it away.

On the mobile home park lots which were deeded over to them they transferred them to somebody else for

no consideration and gave no money to any of these investors.

All of this occurred, your Honor, after I had given it to them when they were in a position to have liquidated it. And even at a discount they would have been able to get enough money to pay everybody off in full and made some money.

So I'm here after having done my very level best to accomplish what was set out to accomplish and make a profit for everybody and to see to it that everybody got paid back. And it was not done not through any negligence or fault on my part.

(p. 10) The Court: I look at that, Mr. Wasman. I guess the European investors did they get anything back for the half million or so dollars?

The Defendant: Your Honor, they were transferred $3,000,000 worth of properties which could have been sold at that time for that money. The figures that I give you are the figures that they could have been sold for.

And they would have been paid out in full. Plus there would have been a profit for everybody else. And I have a list of what the numbers that we put in that PSI. We gave them 116 fully improved lots with water, paving, sewer, electricity and telephone connections.

Each lot worth $6500. We gave them 1244 surveyed and engineered lots valued at approximately $750 each not improved. We gave them a water plant and the lines installed in the first unit.

We gave them a capacity of 500 units of water systems. We gave them a sewer plant with a capacity of 350

units completely installed in the unit. We gave them a recreation building that cost $230,000. We gave them mobile homes that were installed and placed in the park valued at more than $42,000.,

We gave them an office mobile home. (p. 11) These are all double wide, your Honor, which cost us $16,000. We had maintenance equipment such as a small bull-dozer, a backhoe, and so forth, which cost us $45,000.

We had proceeds on deposit in a Swiss bank account of $12,000. We had proceeds on deposit in a Willow Run bank of $3500. We had proceeds in escrow with the Volusia County Road Department which they released in the amount of $10,000.

We had proceeds on deposit in the Miami bank account in excess of $9,000. On the farm in Ocala, the Willow Run farm, they had equipment up there valued at $35,000. They had the farm was valued at a million but worth more.

We had $485,000 mortgages on it which left us with an equity of $515,000. That farm, Your Honor, consisted of three houses and four or five barns, a little race track, machinery equipment, everything.

There was another farm which we had a half interest. The cash investment was $100,000 which consisted of equity. And then the property from the sale of forty acres was $36,000. And the income from that sale was all applied back into the reduction of the mortgage.

There was 360 acres of that left valued (p. 12) at $4,000. And we have an offer, and I think Mr. Moskowitz

has it in his file if it's not in the PSI, in which we were offered $4,000 on April 4th at that time.

If you total that up it comes to $3,264,000. The total amount required to liquidate the obligations of these people, all of which was assigned to them, was a total of $530,000. So they had five or six times as much money available.

Now, what happened was they transferred the Willow Run farm with the $515,000 equity to a man for a note. He never paid him a dime on it. And he then tore the timber off of it and sold it. Took the hay off of it and then sold it. He sold the equipment to the next door neighbor. And not a penny of it went to these people or to the people who got it as trustees for these investors.

The same thing happened all the way down the line. They do not have one piece of land or anything that they retained which they could have and should have for the purpose of paying this off. I had no control of that after I turned it over to them.

I am going to wind up with this brief reference. There is a case, your Honor, in the Circuit Court of Dade County entitled Carl Reber, et al. vs. (p. 13) Robert Little, et al. Robert Little was in and out from time to time a partner with Messrs. Phillips and Comminos.

The Court: Is he dead now?

The Defendant: Yes, sir, he died of cancer.

The Court: I think I have him in another case, Mr. Little.

The Defendant: I am surprised it's only one.

The Court: There are many cases in this court. I certainly don't have them all.

The Defendant: They got together to talk about what I had turned down for them. A company on the Beach, I think Equitable Development Company, was offering some accounts receivable, contracts on land that they had sold for sale at a discount.

I negotiated with them at forty percent, which would have meant a pretty good profit. These gentlemen said that they could sell them in Europe for about fifty or sixty and pick up a profit. I investigated it. I even put up $100,000 of these monies to buy it subject to investigation.

I found out that the insurance company that was supposed to insure the accounts had not (p. 14) committed to insure them and would not. I found that the accounts were not current. I found the real estate monies which were supposed to be escrowed were not.

Anyhow, I turned it down in the early part of '74. Now, the Reber case reflects that when I turned it down and it couldn't be done they got together, Little, Phillips and Comminos, and they sold a package of three million eight hundred some thousand dollars to the Europeans, all consisting of manufactured accounts receivable and documents, attorney's opinion, bank references, approval from the State officials. Everything was manufactured.

What happened in that case was that Phillips joined with one of the investors. And there were a slew of them for that kind of money in suing Robert Little, his partner.

And later after the heat died down the case was dismissed for lack of prosecution because Phillips did not pursue it and at about the same time they formed the International Gold Company and went into business together again and then they were stopped by the Department of Business Regulations of the State of Florida.

So that what he did in that case was instituted a suit to get the heat off of himself. Then (p. 15) as soon as the heat got off they went into something else.

The Court: Mr. Wasman, you are a smart man. I look at you practice law in this area for a long time.

The Defendant: Forty years.

The Court: I got a little note from Mr. Sakowitz that says how competent you are. You are paying forty percent for first share of financing. Accepting your story you are picking the worst people you could find.

The Defendant: I didn't know at the time. They represented they were elite. I didn't know that. If you would meet them you would think they were pretty decent people.

If you are talking about the forty percent, your Honor, the explanation for that, the reason for it aside from stupidity is the fact that they committed to sell other land for us for cash which would have been a big benefit as against selling those same lands on a basis of a fifty percent commission to a local land selling organization on a ten-year plan.

Now, the difference was substantial. In the first place on the sale of the lands that they contracted to sell for us or committed in exchange for (p. 16) this high

price there was no commission. They were going to pay us our full price and they were going to resell them and we transferred these to them and they resold them.

So that we were coming out ahead and the difference of the cost of the financing in one instance was more than made up by the other transaction.

The Court: I understand what you are saying.

The Defendant: That's the only reason I could afford to entertain such a proposition. But I must say this to you, your Honor. I didn't get nor did any member of my family get a dime out of this thing. Everything I have said to you or shown you in that statement as having given up was ours before.

Long before I ever heard of these characters. We bought that property in 1956 with the exception of those two pieces. We developed it, we sold some off. We did a lot of things with it. It was bought with money from my mother's estate and some of the investment was made by my wife from her father's estate.

But not one penny when we should have received payment in exchange for lands that were turned over to them we didn't. My wife gave releases with no (p. 17) consideration because every time I looked forward to the day we got the place competed because of the projection I made on the first 250 mobile home sites showed a profit of $800,000, which would have paid off all the expenses that we incurred plus left us money to proceed.

So I wasn't really worried about paying anything off then. I was going to see to it that they got paid off in the future.

I stand here and I must tell you that the most horrendous part of all this is what I have done to my wife. I just can't tell you how I feel about that. I mean, she has just been through too much and it's my fault.

The Court: Mr. Moskowitz.

Mr. Moskowitz: I think Mrs. Wasman would like to say a couple of words to your Honor, also.

Mrs. Wasman: Your Honor, I wasn't sure what I was going to say but you said something in talking to my husband that gave me an opening.

You remarked the high opinion people have of him as an attorney, he is a smart man. He is all of that. He is a wonderful attorney, he is a wonderful man. He is a warm, compassionate, intelligent man who has one fault.

(p. 18) He never learned what was best for himself. His concern has always been trying to do what other people ask of him rather than what was best for himself, and I must confess what was best for me because he considered me a part of himself and he felt he could always take care of me, and he has.

We didn't get anything out of this. I had some nice trips. I made what I thought was good friends, Mr. and Mrs. Phillips, Mr. and Mrs. Comminos were very good.

Mr. Phillips was in my house for a week of almost every month of the year for about two years. He was a member of my family. But as far as money, any money that may have passed through my husband's hands went right back into where he thought it was important that it go.

We have lived in the same house for forty years. At the age of sixty I had to go back into the working world. That's where I am now. I had complete faith in his judgment and his ability to provide for us.

It's now become my responsibility. We live on pretty much of what I make. I very much wanted him and it was I who said I want to turn this over to them because I saw my husband get a stroke. I knew it (p. 19) was from pressure.

I have already invested at least ten or twelve years of my life and I wanted no more of it. I felt sure that if we were free of it and these people were paid off that he would be able to provide for us.

At the time the pressure got so heavy on him I had the feeling that people who had been my friend had become like scavengers. I felt as though they were trying to eat the flesh off my bones. I had Mr. Gothel and Mr. Phillips pounding on my front door one day.

Not just one day but a couple of times because they were looking for Milton and they were sure that he was hiding someplace because they were trying to pressure him into doing just what we did. We have paid a terrible, terrible price for what I consider were criminal activities of other people.

We are paying for being fools. And we are paying, our children are paying and I hope to God our grandchildren don't pay in humiliation and in knowledge this man they think is the personification of everything wonderful is not.

If you will excuse me I would like to leave now.

The Court: Certainly.

(p. 20) Mr. Moskowitz: A couple of words I would like to say, Your Honor, and then we are finished.

There is nothing more that I can say about this particular case. We did have the opportunity to read over the pre-sentence investigation report and there are a couple of things that I would like to comment upon very, very briefly.

First is as the Court is aware in the pre-sentence report there were a couple of previous matters involving Mr. Wasman. One was an income tax matter back some seven or eight years ago, which was a matter involving failure to file a tax return for one particular year.

It was back I think in '72 or '73. That tax was paid after that. It was a failure to file misdemeanor charge. The other case involved a case that was before Judge Rutger involving obtaining a passport, using a false name. That's the case that is presently on appeal.

That case from my review of some of the documents in some of the submissions to the probation office then also involved the same cast of characters as this one. And particularly Mr. Comminos.

As I said, the case is on appeal now. It was argued before the Fifth Circuit in the early (p. 21) part of November and I expect there will be an opinion in that case rather soon.

Mr. Gale, who was Mr. Wasman's attorney in that appeal, is in the courtroom today. I have talked to him. He mentioned you never know what is going to happen. But the Fifth Circuit was not overly impressed with the case itself in terms of the magnitude of it from what was told to me.

What they are going to do with it on the legal points I really don't know. In my view it could be a very interesting case. It's been a long time and I expect a lengthy opinion shortly.

As Mr. Wasman pointed out there is not much—as Your Honor also pointed out in the statement of Mr. Sakowitz there isn't much else in the PSI that I would like to stand up here and dispute aside from those points we have already covered.

In essence the PSI was really a glowing report of Mr. Wasman in terms of his role as a family man, as an attorney in this town and as a person. The PSI I felt was very favorable to him in all of those aspects.

I would just like to conclude by saying in summary taking into account all of the facts and circumstances of the case and of the associated matters (p. 22) I feel a just and fair sentence in this matter would be some period of probation.

The Court: Mr. Moore.

Mr. Moore: Your Honor, as part of the agreement the Government stated it would not make any specific recommendation but would reserve the right to advise the Court fully of the facts and circumstances.

And there have been certain statements that have been made by Mr. Wasman to the Court today that I would not want to be left unanswered.

There in essence are two versions of the facts of this case. Mr. Wasman has provided the Court with an innocent version that he was somehow used or duped by these other individuals.

First of all, Your Honor, I don't want to address the specific facts to suggest that Mr. Wasman has used to suggest his innocence but would reurge the facts as presented in the pre-sentence investigation and ask this Court to in the final analysis if it must choose between an innocent version or a guilty version of a set of facts that Mr. Wasman is here today because of his plea, albeit nolo contendere, to what in effect amounts to a guilty version or set of facts.

It's one thing if an individual appears (p. 23) before the Court one time and asks the Court to indulge in any questions as to the intent of guilt or innocence. It's another thing if a man appears before the Court a second time and asks the Court to believe him when he tells you that he is innocent.

Your Honor, we are at the point now where the third time around we are stretching our ability to reasonably believe an explanation that I would suggest that we are simply not entitled to indulge in being here the third time.

Mr. Wasman has provided a number of explanations of what was given back to these investors. I might point out first of all that to the best of my knowledge and belief, Your Honor, and I may be corrected on this, but to the best of my knowledge and belief anything that was given back was in actuality taken back following litigation or as a result of a settlement in litigation.

There was nothing gratuitous on anyone's part.

Secondly, to the extent anything was given back it was given back in connection with an entirely different investment scheme, if that's what we can call it, in con-

nection with Traders Cover. Land in Volusia County. Nothing has been done for the (p. 24) investors who purchased the land in Marion County in connection with the LADCO scheme which gave rise to the information of the possession of the forged, counterfeit CD's in this case.

Your Honor, much has been said about the other participants. Mr. Wasman has contrasted himself with other individuals who he believed were businessmen that turned out to be crooked themselves.

If we are going to interpret this in a guilty version or an innocent version of a set of facts, we might simply refer to the phrase that these were really birds of a feather and that Mr. Wasman was simply one of those birds.

We suggest, Your Honor, his position as attorney in Miami that he was one of the central figures in this scheme.

Lastly, Your Honor, we disagree with any suggestion as to the merits of the case in front of the Fifth Circuit. While we recognize that there is a good litigable issue on appeal, we don't really think it should have any bearing on this Court's sentence today for the offense for which this Court must sentence Mr. Wasman.

Thank you, Your Honor.

Mr. Moskowitz: Your Honor, may I make (p. 25) just a couple of quick observations on what Mr. Moore said?

The Court: Surely.

Mr. Moskowitz: First off, Mr. Moore is correct, Your Honor, we are standing here on a plea of nolo contendere. We are not here standing here on a Bench trial to decide

guilt or innocence. But we are also standing here on a plea of nolo contendere to the possession of certain certificates of deposit.

Now, the mail fraud case by the nature of the whole proceedings is tied up in that. That's why as I announced at the change of plea we felt it was imperative to put before the Court Mr. Wasman's comments concerning that. We are not here standing asking the Court to say Mr. Wasman is guilty or not guilty. That's been already adjudicated.

But the only reason for Mr. Wasman's statement to the probation officer, which Your Honor has, is to lay out his version of the mail fraud charge. Which again is somehow tied up in the possession of the certificates.

As to Mr. Moore's comment that the transfer of those properties were really a taking back by the people of their properties, there was to the best of my knowledge no litigation that prompted that (p. 26) agreement which transferred those properties back in the early part of 1975.

In the agreement, which is one of the exhibits that were submitted to Your Honor, it specifically mentions upon the sale of certain of those assets after a small payment per lot to the Wasman family the bulk of the assets will be used to liquidate the investments of the LADCO people. Which were the people involved, the LADCO project was the people involved.

The Court: In the five hundred thirty thousand?

Mr. Moskowitz: Yes, Your Honor, I don't have it before me. It is one of the exhibits in the documents. It's Exhibit J. Which on Page 2 of the exhibit talks of the

proceeds from the sale of a particular parcel going to the creditors American Land Development Company.

Also on Page 3 a couple of points. So the land that was transferred back or transferred over to the control of Messrs. Phillips and Comminos was the sale of that land where the proceeds were to be used to pay back the LADCO investors.

The last thing I wanted to say, as I commented and as Mr. Moore also commented, this is not (p. 27) Mr. Wasman's first time before a Court awaiting sentence. But as I said the passport case is tied up. The appeal in that case is tied up in the presentation.

One of the issues is tied up in the presentation of defense Mr. Wasman offered at that trial involving a kidnapping plot involving Mr. Comminos. The facts in that case are tied to the facts in this case.

The Court: I realize that. That is correct too, Mr. Moore?

Mr. Moore: It is I would say intimately interwoven.

Mr. Moskowitz: And also as far as the tax case is concerned, Your Honor. That was back in 1973. It was a one count misdemeanor information involving failure to file a tax return for one particular year. I don't think that the overall tax was that great. It was paid. Mr. Wasman received a period of probation I think it was.

I don't know what it was. But he served his probation successfully. There was not any indication of fraud in that case. It was a simple one year. Mr. Wasman did not file his tax return, as the PSI indicates. I don't say this as an excuse. As the report indicates, Mr. Wasman

was an attorney in town (p. 28) and just one year he let it slide for not having the time to file it or whatever.

I am not making it as an excuse. We are not talking about a hardened criminal up here before the Court for a third fall. We are talking about first off this case being connected with the passport case and the other case, the tax case, being a deminimus type of misdemeanor violation.

The Court: Doesn't it surprise, Mr. Moskowitz, as bright as Mr. Wasman is that these things have happened to him? And particularly this case.

Over a long period of time, too, that he has had difficulty here.

Mr. Moskowitz: Particularly this case, Your Honor, we are talking about from what I know. I have never met Mr. Phillips and Mr. Comminos is no longer with us. From what I understand these are people who from what I have been told can be quite impressive.

I don't think as the documents that I put forth in the package that we submitted indicate there was ever any intent on Mr. Wasman's part to attempt to hurt anyone.

One of the exhibits that I attached was a payout sheet, I believe a payout sheet. Something I (p. 29) got from the Government on discovery in this case of payments to the investors. Up to the point where Mr. Wasman prior to Mr. Wasman's resignation and prior to the time that he turned the land over to the Phillips, Comminos interest the payout sheet indicates that no investors—if I read it correctly—ever missed a payment for his interest.

The Court: That is the funds that came in from other investors and gave it back, is that not correct, Mr. Wasman?

The Defendant: Some of it came from the sale of another piece of land, Your Honor. The amount was relatively small. Those were interest payments. We made on one transaction $97,000, which would easily have covered all of the interest payments for two years.

Mr. Moskowitz: What I meant to suggest by that comment, Your Honor, during the time Mr. Wasman was involved with the LADCO project nobody got hurt in terms of being out of pocket on that particular occasion. All interest payments eventually did stop. They were all made during the period of time Mr. Wasman was involved with the LADCO project.

Again, we don't stand here asking the Court to decide which version of the facts to believe. We just felt we should present our version of the (p. 30) "mail fraud" case because it is, as everyone I'm sure agrees, is intimately tied in, the background of it is intimately tied in with this particular case before the Court now.

The Court: Mr. Wasman, you are sixty-three now, aren't you?

The Defendant: Yes, sir.

The Court: I remember when you were sick with the problems before. That is sort of by the boards now.

The Defendant: I feel considerably better. I have done a lot towards getting rid of some of the pressure. When I finally be disposed of the last of them I guess I will feel even better.

The Court: Anything further, Mr. Moskowitz?

Mr. Moskowitz: No, Your Honor.

The Court: Mr. Moore?

Mr. Moore: No, Your Honor.

The Court: I think I am going to be lenient with you really because I realize you have been through a lot and you do have the other sentence facing you from Judge Rutger on essentially the same.

As Mr. Moore indicated, the same sort of facts intertwined.

(p. 31) It is adjudged that the imposition of sentence of confinement is withheld and the defendant is placed on probation for a period of two years.

Court is adjourned.

[The hearing was concluded.]

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(p. 32) CERTIFICATE

*State of Florida, County of Dade, ss.*

I, LARRY HERR, Official Court Reporter, do hereby certify that the foregoing transcript, pages 1 through 31, is a true and correct transcription of my stenographic notes of the proceedings before the Honorable EDWARD B. DAVIS, United States District Judge, at the time and place hereinabove set forth.

DATED at Miami, Dade County, Florida, this 14th day of October 1981.

/s/ Larry Herr